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Chapter 10

The Jurisprudence of Mediation

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Abstract

This chapter provides a theoretical account of mediation - a process of dispute resolution that has grown significantly over the past 50 years. It argues that there are three central theoretical models – the pragmatic, the transformative and the narrative, with all other models being ultimately iterations of the latter. The chapter then discusses what various theorists argue are the fundamental features or qualities of mediation. These features include privacy and informality. The chapter concludes by arguing that, in fact, only voluntariness and autonomy, bottom-up justice, and plurality are central to a true jurisprudence of mediation.

1. Introduction

The last 50 years can be seen as telling a story of the slow but steady growth of alternative dispute resolution. The birth and subsequent growth of mediation takes place over similar timescale both intellectually and in practice.¹ It grew from the mid 1960s onwards through a series of statutes establishing conciliation schemes operating in the industrial and employment sectors.² This was followed by the Trade Union and Labour Relations Act 1974 which a year later set up what became known as Advisory, Conciliation and Arbitration Service (ACAS). Conciliation was, and remains for ACAS, what the rest of the legal and dispute resolution world usually calls mediation. A process where a neutral third party facilitates the reaching of a voluntary agreement or settlement between the parties.

What follows is not a history of mediation (there are many useful historical overviews)³ but rather a detailed account of the jurisprudence of mediation. This is not a straightforward task. Mediation has drawn widely from many disciplines.⁴ Despite this intellectual borrowing, or perhaps because of it, there remain relatively few, if any, clear and consistent foundational theories with regards to mediation. Indeed, mapping the conceptual ground of mediation appears to be very much a work in progress as there appears to be no agreed schema. For

¹ The 'father' of mediation, Lon L Fuller's seminal book *The Concept of Law* was published in its final, revised edition in 1969, his 'Mediation – Its Forms and Functions' (1979) 44 *Southern California Law Review*, 305 followed in 1973.

² For example, the Redundancy Payments Act 1965 and the Industrial Relations Act 1971.

³ For example, see Marian Liebmann, (ed) *Mediation in Context* (London, Jessica Kingsley Publishers, 2000).

⁴ Carrie Menkel-Meadow, 'Mothers and Father of Invention: The Intellectual Founders of ADR' [2000] 16, 1 *Ohio State Journal on Dispute Resolution* 1.

example, Menkel-Meadow⁵ derives eight models of mediation from existing literature whilst Boulle⁶ recognises four models and Alexander describes six 'meta-models'.⁷

This chapter will not attempt a complete literature review of works claiming to offer theoretical insight into mediation. Partly because this is an unwieldy task but also because a survey will leave as many questions unanswered as answered. Rather this chapter will attempt to evaluate the principal strands and themes in order to arrive at what is argued to be foundational in mediation theory: identifying what separates it conceptually from both litigation and other forms of adjudicative alternative dispute resolution (ADR) such as arbitration or statutory adjudication.⁸ It will be argued that there are three key theoretical models – the pragmatic, the transformative and the narrative. The chapter will further argue that other so-called models – like the therapeutic – are more properly classified as versions of one of the former. All three predominant models appear to share a number of key features – the privacy of the process, the informality of the process, voluntariness, the bottom-up nature of justice and finally an appeal to a form of pluralism. The chapter will argue that only the latter three aspects – voluntariness and autonomy, bottom-up justice and plurality – are necessary features of all models of mediation. Although voluntariness matters only in the more limited sense of compulsion within mediation as opposed to compulsion to mediate.⁹ These key aspects of mediation echo many of the cultural and intellectual changes of the past 50 years.

This chapter will begin by outlining the claims of Fuller who considered mediation to be a particular form of social ordering ideally suited to polycentric disputes. It will then provide an account of the three models of mediation – the pragmatic, the transformative and the narrative. Following this, analysis partly drawn from Alberstein,¹⁰ will seek to argue that, quite apart from any wider cultural or intellectual trends, mediation theory has not developed in a vacuum but can be clearly located within the wider contours of litigation and dispute resolution. Having established that mediation - irrespective of model - sits intellectually in a relationship with formal law, the chapter will consider four questions in relation to each of the three models. The first of the four questions focuses on the privacy of mediation. This is often assumed to be fundamental to mediation, but it will be argued that this is not a necessary feature of it. This will lead to the second question of whether or not mediation is necessarily informal. It will be argued that informality is not a core feature of mediation at a theoretical level. The third question will consider the need for voluntariness and autonomy for the actual parties to the dispute. Fourthly, the concept of justice in mediation will be considered. It will be argued that mediation appeals to a 'bottom up' justice or a horizontal (as opposed to a vertical) approach and that questions of its privacy and informality will be considered but it will be argued that neither of those are unique to mediation or essential to the theory as opposed to the practice of mediation. This leads to a discussion of the plurality that I argue underpins mediation and which sits very comfortably in the diversity of contemporary United Kingdom.

This chapter will argue that mediation appeals to an alternative account of justice and ultimately mediation appeals to a pluralistic paradigm, both descriptively and normatively. The degree of pluralism can vary between accounts. Pluralism in mediation embraces - especially in its more evaluative form – not just a recognition of overt legal rights but also of other

⁵ Carrie Menkel-Meadow, 'The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices' [1995] *The Negotiation Journal*, 217, 228-230.

⁶ Laurence Boulle, *Mediation: Principles, Process, Practice* (2nd edn, London, Lexis Nexis Butterworths, 2005).

⁷ Nadja Alexander, 'The Mediation Meta-Model: Understanding Practice' [2008] 26, 1, *Conflict Resolution Quarterly*, 97.

⁸ For example, construction adjudication under the Housing Grants, Construction and Regeneration Act 1996 or deposit protection adjudication under the Housing Act 2004, ss212-215 as amended by the Localism Act 2011, s184.

⁹ See also Julian Sidoli del Ceno 'The Problem of Compulsory Mediation: Civil Justice, Human Rights and Proportionality' (2014) 6, 3, *International Journal of Law in the Built Environment*, 286.

¹⁰ Michal Alberstein, (2009) *Forms of Mediation and Law: A Jurisprudence of Mediation*, ExpressO, http://works.bepress.com/michal_alberstein/1 (accessed 16 December 2020).

conceptions of justice and views of 'the good' is a strength and not a weakness. Finally, it will be argued that the final core element of mediation is based around the argument that litigation is harmful generally to most parties and that mediation seeks to limit this - and that whilst talk of positive experiences of conflict might be flights of fancy – there is a genuine attempt at preserving relationships and, in some sense, healing.

2. Social Ordering and Litigation

Fuller in many important papers during the course of the latter half of the twentieth century outlined an account of how functioning society ought to be governed, or perhaps more appropriately ordered for there is no necessity for 'ordering' always to be 'top-down' or pyramidal. This project that he called 'eunomics' (literally 'good order' frequently referred to by Summers and others as the 'principles of social order')¹¹ did not develop in a systematic way and was left incomplete at his death in 1978. Winston gathered these elements of Fuller's work - which have received less critical attention than his more overtly jurisprudential work - together for a wider readership¹². The basic argument running through this project is that there are many ways in which we can and do order society and human interactions. Adjudication is one of them but only one of them along with managerial direction, contract, legislation, and mediation. Adjudication is appropriate in many arenas but has its limits. Most notably, Fuller considered adjudication to be poorly suited to polycentric disputes¹³ and coordinating collective activities. Fuller borrowing the term 'polycentric' from Polanyi¹⁴ used it to describe disputes with not only multiple parties - that the courts clearly can and do deal with (the 'class action' in the US context for example) - but disputes with a wide variety of participants. Participants (or stakeholders) are those with an interest in the dispute not necessarily a legal interest or right and who tend to represent numerous different perspectives, values, and interests.¹⁵

The question of polycentrism is a complex one¹⁶ and not fundamental for the present enquiry. What is more important and central to the subsequent discussion is that Fuller also argues that not all forms of social order require external authority. He states that this tendency is a 'modern thought.'¹⁷ Fuller regards mediation properly understood not as something that aims to achieve conformity with external norms under the aegis of authority – state or otherwise but rather 'toward the creation of the relevant norms themselves'.¹⁸ Further, Fuller sees the State as being perceived erroneously as the font of all truth, that individuals cannot operate through custom, reason and other traditional mechanisms but must instead be subject at every turn to the courts or the civic authorities:

Now the tendency is to convert every form of social ordering into an exercise of the authority of the state, or, among sociologists, into a projection of "norms" by an abstract entity called "society". Legislation, adjudication, and administrative direction, instead of being perceived as distinctive interactional processes, are all seen as unidirectional exercises of state power.¹⁹

¹¹ Robert Summers, *Lon L. Fuller* (London, Edward Arnold, 1984)

¹² Lon L Fuller & Kenneth I. Winston, *The Principles of Social Order: Selected Essays of Lon L. Fuller Edited, with an Introduction by Kenneth I. Winston.* (Durham N.C., Duke University Press, 1981).

¹³ Polycentrism is a term used to describe an organising principle based around 'many centres'. In dispute resolution its meaning has adapted to mean that there are many participants to the dispute or a dispute with many central issues.

¹⁴ Michael Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (Chicago: University of Chicago Press, 1951).

¹⁵ Lon L Fuller, 'The Forms and Limits of Adjudication' [1978] 92 *Harvard Law Review* 353, 394-5.

¹⁶ See, for example, John WF Allinson 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' [1994] 53, 2, *Cambridge Law Journal* 367.

¹⁷ Lon L Fuller, n1 above at 315.

¹⁸ *ibid* at 308

¹⁹ *ibid* at 339

It is this idea that provides the most useful building block for a jurisprudence of mediation. Mediation does not appeal *per se* to the power of the state or to external legal principles. Evaluative mediators may frequently make reference to the 'law' or what a tribunal might find on the facts but these are arguably not true to the concept of mediation and certainly they are not fundamental to the theory of mediation. Rather, mediation provides avenues for disputes to be dealt with without reference *per se* to external sources of authority. Individuals can be sources of their own 'personalised authority'.

However, tensions between 'mediation as suitable for polycentric disputes' and 'mediation as personalised authority' can clearly be seen. Fuller's work here is – like elsewhere – a rich source of ideas but one which has not been fully or systematically developed. There are clear implications in Fuller's work that some disputes are suited to mediation and that litigation is not necessarily the most appropriate and certainly not the only form of dispute resolution. Implicit in this is that mediation has an internal logic and coherence but that this logic is perhaps rather narrow, confined, and separate. Following Fuller many versions and models of mediation have developed. Fuller's contention that there is one logic of mediation is questionable. Numerous models of mediation have emerged since Fuller; each attempting to provide a different account of the essence of the practice – some placing mediation conceptually close, if different in practice, to negotiation and litigation with the aim being an outcome. Others have concentrated more on the second aspect of Fuller's project, that of recognising or creating other forms of authority. This is taken to its most extreme, or fullest, in narrative mediation where participants are encouraged to create their own account both of the dispute and of the resolution through an appreciation of sometimes radical subjectivity.²⁰ What follows is a brief account of the prevalent models of mediation focussing solely on their theoretical aspects. Each model reveals its jurisprudential commitments at a deeper level of theoretical analysis. It will be argued that Fuller's central contention – that there are a number of ways of properly ordering society – remains a valuable insight.

3. Models of mediation

As mentioned earlier there is no agreed conceptual account of mediation. Neither is there an agreed account of the type or number of models of mediation. This section will argue that there are four principal models of mediation theory. It will not address issues of models of mediation in practice although there is some overlap between the theory and practice of the discipline.

3.1 Pragmatic mediation

Pragmatic mediation aims to reach an agreed settlement between the parties without coercion. The pragmatic model is concerned with 'Getting to Yes' as expressed by Fisher and Ury.²¹ Many appear to take the publication of this book as marking a sea-change in attitudes towards ADR generally although earlier works such as Smith could possibly lay claim to this title too.²² What predominantly matters on this model is reaching an agreement, an agreement that is 'win-win' or of a certain quality for both parties but nonetheless an agreement, a settlement. Pragmatic mediation can often be seen as a development of negotiation, negotiation with the addition of a third party who assists in opening channels of communication. How pragmatic mediation is described can vary. Supporters will frequently talk about finding new creative solutions to old problems. Opponents will sometimes categorise it as unprincipled bargaining.

²⁰ Subjectivity, or perspectivism, in this context argues for the primacy of the agent's personal response to a matter be that through a particular ethical lens, the reading of a sequence of facts or indeed an appeal to alternative set of facts.

²¹ Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement without giving in* (Penguin, 1981).

²² David Smith, 'A warmer way of disputing: Mediation and conciliation' [1978] 26, *American Journal of Comparative Law* 205.

Pragmatic mediation can be seen to have two sub-models: the facilitative and the evaluative. It will be argued that theoretically whilst both share in a pragmatic concern with settlement only the facilitative model is actually mediation properly understood.

The facilitative approach to mediation, described as 'pure' by Menkel-Meadow,²³ involves no adjudicative direction of any kind or any assumption of substantive expertise by the mediator. Instead, the mediator is a third-party, who utilising their own skills, works with the disputants to solve the issues that present themselves. On this account, the mediator assumes a positive attitude towards the disputants. They are sufficiently intelligent and are themselves best placed to find a solution. The mediator's role then is to remove barriers to engagement and open channels of communication between the parties thereby allowing the participants to reach their own settlement.²⁴ This can be contrasted with evaluative mediation. Brown states that: 'The evaluative mediator's tasks include finding facts by properly weighing evidence, judging credibility and allocating burden of proof, determining and applying relevant law, rules or customs and rendering an opinion.'²⁵

Both these predominant models appear to implicitly depend on an 'outcome' being achieved. Evaluative mediation has become particularly popular in certain commercial areas of the law where professional expertise is often central to the dispute, for example construction.²⁶ They can therefore, perhaps, be labelled as 'pragmatic' forms of mediation. The outcome is either the final settlement of the dispute or, at the very least, a partial settlement through a narrowing of the issues. Both of these models fail to consider, or at least, appear to ignore other strengths or possible advantages of mediation. There appears little reference to enhanced communication, empowerment and transformation that appear in other models.

However, whether evaluative mediation is actually a form of mediation at all is questionable. That it is an 'alternative' method of dispute resolution is clear, but it perhaps bears more similarity to early neutral evaluation or judicial determination. This is because in all these methods the third party is not a mere facilitator or perhaps more significantly not *primarily* a facilitator. Rather they act in a vertical relationship to the parties. The evaluative mediator – like the expert, the retired judge, or the like, sits in a relationship of supremacy to the participants. It is they who have the specific expertise be they a civil engineer, a quantity surveyor, architect or whatever. It is they who make decisions about the facts and, in many cases, the law. That the evaluative mediator cannot compel a settlement, or the retired judge cannot issue a binding court order means that they are not forms of litigation. They do however operate on an adjudicative paradigm. This paradigm is vertical or top-down and not horizontal as in mediation. It is arguable that the degree of evaluation is significant and that a mildly evaluative approach may not remove the fundamental, voluntary, and facilitative nature of the mediation as a whole. Further, some evaluative direction may assist the aim of 'settlement' or 'agreement' – the holy grail of the pragmatic approach.

3.2 Transformative mediation

Other models, which are here termed 'idealist', attempt to move away from this. Transformative mediation is one widely recognised approach that seeks to emphasise the value of the process itself and which distances itself from what it sees as narrow results driven conceptions discussed above. It claims that the outcome of the particular dispute to which the mediation pertains is not an important factor. Further, it challenges the assumption that the

²³ Carrie Menkel-Meadow, 'Lawyer negotiations: theories and realities – what we learn from mediation' [1993] 56, 3, *Modern Law Review* 361.

²⁴ Leonard Riskin, 'Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed' [1996] 1 *Harvard Negotiation Law Review*, 7, 24.

²⁵ Carole Brown, 'Facilitative mediation: The Classic Approach retails its appeal' [2003] 4 *Pepperdine Dispute Resolution Journal* 279, 290.

²⁶ Penny Brooker & Suzanne Wilkinson (eds) *Mediation in the Construction Industry: An International Review*. (Abingdon, Spon Press, 2010).

mediator controls the process. It is associated primarily with the work of Bush and Folger who describe it thus:

“The transformative approach instead defines the objective as improving *the parties themselves* from what they were before. In transformative mediation, success is achieved when the parties as persons are changed for the better, to some degree, by what has occurred in the mediation process.”²⁷

Transformative mediation then looks beyond the particular dispute to the person. Originally, moral growth was deemed to be the aim or outcome of transformative mediation. Bush and Folger duly recognised that by stating this they contradictingly were effectively replacing one end goal of mediation for another. In later work, mediation is described as having the “*potential* [of] *transformative effects*.”²⁸ Recognition and empowerment now became the stated goals for Bush and Folger.²⁹ Conflict is not seen as something that is ultimately positive in a way that Fiss might.³⁰ It is not cathartic. Conflict is not about establishing a ‘right’ to something or a precedent or enacting social change. Rather, conflict ‘de-skills’ individuals, disconnecting themselves from others.

Advocates of transformative mediation have been amongst the most vocal in criticising the increasing *juridification* of mediation.³¹ Apart from Bush and Folger, others such as Della Noce and Antes, have expressed concern about the increasing involvement of both lawyers and the courts in mediation.³² They consider this as undesirable as, they argue, that this results in both an increasing emphasis on settlement and on evaluation and appeals to external norms by the mediator. Indeed, Bush and Folger oppose any attempt at mingling any other model with their own.³³

There are numerous critiques of this model. It has been argued that there is little to actually support the rather broad assumptions they make and conclusions they draw.³⁴ Much depends on transformative mediation providing an underlying theory of human development. This is lacking for Seul, for one, who argues that this is seriously under theorised. Neither is an existing theory of psychological human development used to support the claims of the theory nor is a new one presented.³⁵ Kelly has argued that transformative mediation developed ‘as a result of observations rather than systematic analysis of theoretical concepts leading to applications.’³⁶ The most compelling criticism however attacks not gaps in the theory but rather its heart. Mediation seemingly rests on a plurality of values and the view that the mediator is not ‘better’ or more important or more authoritative than the disputants. However, transformative mediation seems to suggest that the values of the transformative mediator namely empowerment and recognition are ontologically prior to the values of the disputants.

²⁷ Joseph P. Folger and Robert A. Baruch Bush, *The Promise of Mediation*, (2nd Edition, San Francisco, Jossey Bass, 1994, 84).

²⁸ Joseph P. Folger and Robert A. Baruch Bush, ‘Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice,’ [1996] 13, 4 *Mediation Quarterly* 263, 277. Italics present in the original.

²⁹ *Ibid* at 263.

³⁰ Owen Fiss, ‘Against Settlement’ [1984] 93 *Yale Law Journal* 1073.

³¹ Penny Brooker, *Mediation Law: Journey to Juridification and Institutionalism* (London, Routledge, 2012).

³² Robert A. Baruch Bush ‘Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What It Means for the ADR Field.’ [2002] 3 *Pepperdine Dispute Resolution Law Journal*, 111.

³³ Joseph P. Folger and Robert A. Baruch Bush n28 above.

³⁴ Lisa P. Gaynier, “Transformative mediation: In search of a theory of practice”, [2005] 22 3 *Conflict Resolution Quarterly*, 397.

³⁵ Jeffrey Seul, “How Transformative Is Transformative Mediation? A Constructive-Developmental Assessment.” [1999] 15 1 *Ohio State Journal on Dispute Resolution*, 135.

³⁶ Terri Kelly, *A Somewhat Critical Analysis of the Transformative Model of Mediation*. [2000] Portland, Oregon: Department of Conflict Resolution, Portland State University.

Bush and Folger naturally attempted to respond to this critique and others.³⁷ They argued that the difference lies in the fundamental values and approach of the mediator to the mediation rather than in asserting a specific set of values. It could be argued that this view could be analogous to King Rex's eight principles for a working legal system.³⁸ Mediation, arguably all mediation, requires certain fundamental attitudes or assumptions. Later it will be sketched in more detail what these are and are not. One of them it is argued is that the parties reach their own solutions. In doing this it is likely that they are empowered to do so and that by definition they have achieved some recognition of their own autonomy.

3.3 Narrative Mediation

Narrative mediation ultimately traces its intellectual roots to post-modernism. Facts are socially constructed, and truth is subjective. There are a wide variety of narratives that could possibly deal with the same set of facts. According to narrative mediation, no account has priority or 'more truth.' There is a strong, possibly, radical subjectivity to narrative mediation. It acknowledges cultural context and personal preferences whilst at the same time radically ignoring external attempts at objectivity or norm creation. These external norms include the actual 'law' whether as written in books or generally understood and accepted.

However, narrative mediation is not simply a theory. It has practitioners, albeit far fewer than other models. In this respect, the pragmatic model dominates. This is unsurprising. Narrative mediation is practiced from a number of centres most notably in Hamilton, New Zealand and University of San Diego, USA. Its origins as a practice can be traced to psychological therapy. Emerging in the 1980s the views of the therapist were not prioritised over those of the patient. In this way narrative mediation utilises a horizontal approach to expertise and norms. There is not one 'objective' account but rather there are a multiplicity of stories. The patient was encouraged to find their own story and to create their own narrative, a narrative that moves beyond hurt and rights. 'It is widely accepted that mediation is a storytelling process...telling one's story in mediation serves simultaneously the ethical mandate, "participation," as well as the pragmatic mandate to move "from story to settlement".'³⁹

The narrative account seeks to consider the subjectivity of facts and encourages a story-telling, or a re-story-telling in the light of engagement, trust building and to "deconstruct the conflict-saturated story".⁴⁰ The story-telling tradition is an important aspect of both the practice and theory of narrative mediation. Practically, it seeks to create alternative accounts of the dispute and the participants. It aims to move away from the polarities of victim and oppressor. In doing so it seeks to 'destabilize those "theories of responsibility" which simultaneously serve to legitimate one's point of view and de-legitimate the point of view of the other party.'⁴¹ In doing so the participants are enabled and empowered to see new interpretations of the dispute.

This 'looking afresh' at the dispute would seem to be a common feature of mediation generally. Mediation generally appeals to the creative, personalised solution without recourse to external authorities. The narrative approach also maintains the mediator as a third-party in a horizontal

³⁷ Joseph Folger & Robert A. Baruch Bush, 'A Response to Gaynier's "Transformative Mediation": In Search of a Theory of Practice', [2005] 23 *Conflict Resolution Quarterly*, 123.

³⁸ See Lon L. Fuller, *The Morality of Law* (revised ed, Yale University Press, New Haven, 1969) 33–38 for his description of the eight principles of legality.

³⁹ Sara Cobb, 'A Narrative Perspective on Mediation: Toward the Materialization of the Storytelling Metaphor', in Joseph P. Folger & Tricia S. Jones (eds) *New Directions in Mediation: Communication Research and Perspectives* (Sage, 1994).

⁴⁰ John Winslade & Gerald Monk, *Narrative Mediation: A new approach to conflict mediation*, (San Francisco: Jossey-Bass, 2000).

⁴¹ Toran Hansen, 'The Narrative Approach to Mediation', (2004) 4 *Pepperdine Dispute Resolution Law Journal*, 297, 298.

relationship with the participants to the dispute. There are subtle differences however between narrative mediation and other models. The former questions more radically the existence of external norms whereas for other models they are considered to be simply less useful to the wider goals of settlement (for pragmatic mediation) and transformation and personal growth (for transformative mediation). Narrative mediation in terms of process and outcome seems to sit between the pragmatic and the transformative schools. It places value on the process of the mediation by aiming for the participant to better understand the conflict but also seeks to reach a resolution where the dispute or conflict is no longer.

3.4 Therapeutic mediation

Another so-called model of the 'idealist' persuasion seeks to argue that the insights of therapeutic jurisprudence can be productively applied to mediation. Therapeutic mediation emphasises the healing element of mediation. It is linked to wider trends of therapeutic jurisprudence and restorative justice. Daicoff is one who has recognised the link between mediation and transformative justice:

All of the disciplines comprising the comprehensive law movement share at least two features in common: (1) a desire to maximize the emotional, psychological, and relational wellbeing of the individuals and communities involved in each legal matter; and (2) a focus on more than just strict legal rights, responsibilities, duties, obligations, and entitlements. These two features unify the vectors and distinguish them from more traditional approaches to law and lawyering.⁴²

There is an assumption that bottom-up processes are inherently therapeutic. This is more often claimed rather than evidenced. Nevertheless, this approach is often linked to "Restorative Justice" in the criminal law. Here the aim is to restore not just the victim and her community to its state prior to the breach by the crime, but also to restore the defendant to the community. However, there is little in this that separates therapeutic mediation from other models. It has no distinct rationale or methodology of its own. Rather it is an attempt to emphasise one benefit of mediation. That therapy or healing can be a beneficial aspect of mediation is not questioned. It is however simply a quality that is aspirational to all models of mediation. It is overt in transformative mediation but present in others. It will be discussed further below.

4. Models of mediation and jurisprudential assumptions

There are then a number of different theoretical models of mediation. The three most prevalent are, as outlined above, the pragmatic or problem-solving (itself constructed of two distinct approaches namely the facilitative and the evaluative), the transformative⁴³ and the narrative.⁴⁴ Both the transformative and narrative accounts of mediation give much more weight to the process of the resolution rather than the outcome. The transformative seeks to alter perceived power imbalances through perspective taking and the deliberate making of choices. At one extreme, transformative mediation claims to be wholly uninterested in the outcome itself aiming rather for transformation of the participants and hence onward to the transformation of disputes themselves. It is doubtful if this is in practice the case.

⁴² Susan Daicoff, 'Law as a Healing Profession: The Comprehensive Law Movement,' [2006] 6 *Pepperdine Dispute Resolution Law Journal*, 1, 11.

⁴³ Joseph P. Folger and Robert A. Baruch Bush n27 above.

⁴⁴ Alison Cotter, Gerald Monk, & John Winslade, "A Narrative Approach to the Practice of Mediation" [1998] 14 *Negotiation Journal* 21. John Winslade & Gerald Monk, *Narrative Mediation: A new approach to conflict mediation*, (San Francisco, Jossey-Bass, 2000).

Alberstein has gone further and has identified how different models of mediation display different tensions and concerns existing at the boundaries of theory and practice.⁴⁵ For example, the pragmatic model has at its root a practical lawyering or practitioner focus whereas in the transformative model a therapeutic concern rises to the surface. Alberstein also places the narrative model within an anthropological framework. Probing more deeply in a later work Alberstein argues that each of these models displays their jurisprudential commitments.⁴⁶ Alberstein places the pragmatic account with what is a reasonably well-known account of the emergence of the legal process school⁴⁷ in the US following the second world war.⁴⁸ For Alberstein the pragmatic model echoes the optimism of the legal process school. Things can be done, achieved, overcome. Pragmatic mediation also aims for consensus building; again echoing American culture of the 1950s that found expression in many US law schools of the period notably Harvard.

Alberstein locates the transformative model of mediation within relational feminism. Alberstein is not alone in this assessment although it does run counter to some other critical feminist accounts.⁴⁹ Lichtenstein finds that transformative mediation and feminism both promote self-determination and deal with the question of power by attempting to find alternative readings. Lichtenstein thus locates both transformative mediation and feminism within a 'colorful pluralistic social movement.' Gilligan is often classified as a 'second wave' feminist focusing on the relational.⁵⁰ This relational approach recognises different voices and different perspectives that need to be recognised in order to overcome structural differences and apparent dichotomies such as individualism versus community.

The narrative model has its roots according to Alberstein in the critical legal studies movement originating in the 1970s and 1980s. This movement offered a radical critique of law and its structures as betraying its ideological origins.⁵¹ Alberstein states: 'This call to reveal the ideology behind formal rules is equivalent to the *narrative* model's exposure of the sense of entitlement underlying conflict stories.'⁵²

The Critical Legal Studies project seems to end in despair however with little remaining but scepticism and resignation. The 'law and society' school offers a more optimistic post-modern account by developing the view that disputes are socially constructed. Individuals should internalise their understanding of law in society and their place within it. By doing this they thereby develop a deeper understanding of legal entitlements moving beyond a fixed and basic understanding of 'rights' as something that happens to you (or the State 'gives' to you or the lawyer defends 'for' you) to a situation where the participants are actively involved in creating 'justice'. This echoes Winslade and Monk, two leading theorists of the narrative mediation model, who argue that mediation works by the parties moving beyond the original account of injustice and naïve entitlement and instead co-authoring a new account of shared participation.

What arguably all three models have is a commitment to justice as something that can be, although not necessarily always, discovered between the parties and a sense that conflict in itself is not a valuable or useful process for the individuals and therefore there is an element

⁴⁵ Michal Alberstein, *Forms of Mediation and Law: Cultures of Dispute Resolution*, [2007] 22 *Ohio State Journal on Dispute Resolution*, 321.

⁴⁶ Michal Alberstein n10 above, 12.

⁴⁷ I am unhappy with use of terms like 'school' for what are often loosely grouped individuals working in related fields especially as many monikers are added later by historians of ideas but they are used here for brevity, a degree of clarity and because they are used by Alberstein in her paper.

⁴⁸ Neil Duxbury, *Patterns of American Jurisprudence*, (Oxford, OUP, 1995).

⁴⁹ Marsha Lichtenstein, 'Mediation and feminism: Common values and challenges', [2000] 18 *1 Mediation Quarterly*, 19.

⁵⁰ Carol Gilligan, *In A Different Voice* (Cambridge, Harvard University Press, 1982)

⁵¹ Roberto Mangabria Unger, *The Critical Legal Studies Movement*, (Cambridge, Harvard University Press, 1986)

⁵² Michal Alberstein, n10 above.

of trying to mitigate the damage caused by the conflict. Each model takes a distinct approach to this – by creating a positive outcome, by empowerment or by creating a new perspective on the conflict itself – but they share a therapeutic paradigm. Litigation is often seen, arguably correctly, as stressful and difficult. Mediation attempts to provide a less painful way of resolving the dispute. Therapy or healing is pervasive to mediation. It is for this reason that ‘therapeutic mediation’ classified by some as a separate model of mediation is not so here. All models of mediation see value to the person. The pragmatic primarily by ending the dispute in a way that is at least satisfactory to all parties. The transformative by encouraging human growth and change. The narrative by seeing afresh values and norms.

This ‘healing’ aspect was noted by Shaffer and McThenia in their debate with Fiss.⁵³ This clearly demonstrates – once you get beyond the rhetorical and not always helpful language used by both parties – that very different conceptions of what justice is are held by Fiss from Shaffer and McThenia. There may actually be far less difference with the substantive outcomes of justice – a broad fairness seems to appeal to both, but for Fiss this must emerge in a top-down fashion through the courts whereas for Shaffer and McThenia ‘Justice is not usually something that people get from the government. And courts...are not the only or even the most important places that dispense justice.’⁵⁴ It could be argued that those who support mediation and those that oppose it – whatever else might separate or unify them – divide over this point of whether justice is top-down or whether it is bottom-up and therefore pluralistic in some way.

5. The core features of a jurisprudence of mediation

Having outlined the main theoretical models of mediation the remainder of this chapter will seek to consider what each of them appeal to at a more fundamental level. It will consider privacy, informality, voluntariness and autonomy, bottom-up justice, and pluralism.

5.1 Privacy

One of the major criticisms laid at the door of mediation is that it is private. The same is true of course of other forms of ADR including arbitration that originally operated outside the formal court structure but is now subject to both statute⁵⁵ and frequent scrutiny by the courts.⁵⁶ It has already been discussed above that in the UK and most comparable common law jurisdictions mediation now largely takes place within a framework of civil justice and regulation, but this does not seem to satisfy the critics of the practice. What do we mean though by stating that mediation is private? Mediation is private in the limited sense of not taking place in public, but it is now very often part of a wider dispute that is not truly private. It may be court-annexed or on the recommendation of the judge. There are questions on how confidential the mediation actually is.

The question of the public or private nature of dispute resolution cannot then be separated now from its relationship to civil justice as a whole. Mediation as a practice originates outside the domain of civil or family law yet most of the discussion concerning mediation certainly in the UK – but also in Europe and other ‘Western’ jurisdictions⁵⁷ – is now very much centred on

⁵³ Thomas Shaffer and Andrew McThenia, ‘For Reconciliation’ [1985] 94 *The Yale Law Journal*, 1660.

⁵⁴ Ibid 1664-1665.

⁵⁵ Arbitration Act 1996.

⁵⁶ For example, *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 on the question of the confidentiality in arbitration and *Newfield Construction Ltd v Tomlinson* [2005] 97 Con LR 148 on the arbitrator’s award for costs based on procedural irregularity.

⁵⁷ Paula Young, ‘A Connecticut Mediator in a Kangaroo Court?: Successfully Communicating the ‘Authorized Practice of Mediation’ Paradigm to ‘Unauthorized Practice of Law’ Disciplinary Bodies,’ 2008 49 *South Texas Law Review*, 1047.

how it relates to and operates within the overarching edifice of the law and the prevailing system of civil justice. Genn sees mediation operating within the sphere of civil litigation. Without the stick of litigation and the threat of costs she argues parties do not usually mediate. The take up of mediation has been disappointingly slow for some members of the judiciary. Brooker has argued that mediation in the civil justice context has now become thoroughly juridified.⁵⁸ This seems unquestionable. There is now an extensive and ever growing case law on when mediation can be legitimately refused⁵⁹ and the sanctions that can be imposed for unreasonably refusing,⁶⁰ the confidentiality of the mediation process, the role of the mediator, the requirement of good faith,⁶¹ the enforceability of any agreed mediation settlement,⁶² and the appropriateness of mediation in various types of disputes⁶³ to name but some of the questions that have been discussed and decided by the English and Welsh judiciary.

How are we to evaluate this process? Some argue that this juridification removes the genuine uniqueness and empowerment from the process.⁶⁴ That a book entitled 'Mediation Law' has been recently published is anathema to this group. They perceive mediation as being wholly separate from litigation not just in terms of its philosophy but also in terms of its organisation. This rather radical position is not the majority position unsurprisingly among lawyers. Indeed, it is lawyers who seem to play an ever-increasing role in mediation whether it is by advocating it, being sceptical about it, acting as gatekeeper or participating whether as the legal representative to a party in mediation or actually as the mediator themselves. The rise of evaluative mediation can be linked to the increasing use of lawyer-mediators or others will specialist subject specific knowledge, for example, in construction law.⁶⁵ Many lawyer mediators seem to be very evaluative. They seem to have no difficulty in stating that this or that is the legal position, 'I help them reach the right answer... the right answer in accord with the legal principles.'⁶⁶ The question of whether these developments are positive or not is a separate question. What is relevant here is what do we mean by privacy in mediation and is this fundamental to our theoretical understanding of it?

Privacy in mediation can have three meanings. This is rarely unpacked. It can mean the actual process is private i.e. takes place in a private room with the discussions remaining private to the parties, the mediators and their legal representatives. This is quite a small claim in reality. Many negotiations are private in this sense. Other forms of ADR are also private in this way. The presence of a mediator who is a third party neutral and bound in most cases by both ethical and practice rules limits the genuine privacy of the process. Frequently, lawyers attend mediations along with their clients. They too are bound by professional ethics and guidance. It seems then that this use of privacy is simply confidentiality. Highly desirable in many cases but not fundamental or unique to mediation.

The next use can apply to the subject matter – law or disputes that only affect the parties concerned. Private law is a distinct category in many jurisdictions. In England and Wales, private law is not a usual category although it is understandable enough. Typically, one would

⁵⁸ Penny Brooker n31 above.

⁵⁹ Julian Sidoli del Ceno, 'Mediation and the Judiciary: Negotiation is not enough', [2012] 21 *Nottingham Law Journal*, 146.

⁶⁰ Julian Sidoli del Ceno, 'Costs, Mediation and the Judiciary' [2015] 92 *The International Journal of Arbitration, Mediation and Dispute Management*, 105.

⁶¹ Penny Brooker, 'Mediating in Good Faith in the English and Welsh Jurisdiction: Lessons from other Common Law Countries' [2014] 43 *Common Law World Review*, 120.

⁶² *David Frost v Wake Smith and Toffields Solicitors* [2013] EWCA Civ 772, 2013 WL 2975981 see: Julian Sidoli del Ceno 'Mediated settlements and Enforceable settlements: Frost v Wake Smith Arbitration, (2013) 79 4 *The International Journal of Arbitration, Mediation and Dispute Management*, 467.

⁶³ *Faidi v Elliott Corp* [2012] EWCA Civ 287 see Julian Sidoli del Ceno 'Mediation in Neighbour Property Disputes Arbitration', (2012) 80 4 *The International Journal of Arbitration, Mediation and Dispute Management*, 405.

⁶⁴ Geoffrey Gibson, 'Is mediation getting on the nose? Are the judges killing mediation?', [2005] 7 6 *ADR Bulletin*: Available at: <http://epublications.bond.edu.au/adr/vol7/iss6/4>

⁶⁵ Penny Brooker & Suzanne Wilkinson n26 above.

⁶⁶ Interview. On file with the author.

think of it as including contract, wills, property, and aspects of family law although other areas might or might not make the list. Where there is clear public approval or disapproval for a certain course of action then the law is 'public' in the sense of criminal sanction or public law *in strictu sensu*. Supporters of mediation usually see it operating either exclusively or very largely in the private arena – the family being the most common. The rationale being that arrangements, say, for the care of children are in most cases a private concern for the parents. A background assumption is that most parents love their children, are broadly rational and will seek to provide the best care as they see fit. There is clearly a subjective or personal element in this, but we don't usually intervene or feel we should intervene unless there is actual neglect or abuse. I may find the thought of parents feeding their children McDonald's distasteful and verging on the obscene, but it remains a private matter. There is a wider sense however that all law is in some sense public. Contracts are subject to statutory intervention, case law and supervision by the courts. Fiss is one theorist who takes the line that there is no private when it comes to law, all is public.

Finally, the other use of private is perhaps the most fundamental. It argues that both the process and the outcome of the mediation are private in the sense that they are subjective to the participants. Here, we find the appeal sometimes implicit sometimes explicit that parties can, do and should find their own solutions and that if the solution is satisfying for them then it is not for external, public scrutiny of its validity according to the law or otherwise. (This assumes parties being broadly equal and non-coerced). Privacy here then equates to a pluralistic conception and a bottom-up understanding of a just outcome. Again, this is contentious, but I contend is fundamental to the nature of mediation without which it cannot be truly mediation.

5.2 Formal and Informal

Mediation theory sits broadly on the informal axis. It is not usually a hidden negotiation or bargain between the parties, the fact that the mediator is a neutral third-party with, for the most part, appropriate skills and training avoids bullying or naked bargaining. Further, in many jurisdictions as outlined above mediation is in a relationship of varying kinds to the prevailing civil or family justice system. The turn to informalism in Western jurisdictions has no agreed roots or indeed causes. Some see it as a welcome relief from ever centralising governmental bodies, be they national or supranational such as the European Union. Others such as Abel argue that the growth of informal dispute resolution bodies has actually increased state activity. If one accepts Abel's arguments, based on the US, then an example in the UK could be considered to be early invention instruments in UK housing. For example, selective licensing of landlords in the private rented sector alongside tenancy deposit legislation has actually increased statutory intervention into areas of residential housing that had previously used adjudication through the courts as the primary or often sole form of dispute resolution in residential housing matters. In this way, areas that were private at least until a dispute requiring adjudication crystallised, have now become subject to scrutiny and intervention.

Roberts and Palmer find a number of 'impulses' towards informalism. They discuss a 'political impulse' that they identify in various co-operative type movements and the like arguing that a socialist inclination lent itself to scepticism about the legal system with its perceived class and wealth biases. They also identify an 'ethnic impulse'.⁶⁷ Here ethnic and religious groups retreat into self-regulating enclaves and self-regulate their own communities often outside of

⁶⁷ Simon Roberts and Michael Palmer, *Dispute Processes: ADR and the Primary Forms of Decision-Making*, (2nd edition, Cambridge, CUP, 2012, 25-27)

the main stream legal culture.⁶⁸ This has been noted recently in contemporary Birmingham.⁶⁹ This notion appears to link to the more common idea of culture. Not only legal anthropologists have found tendencies to informal justice in certain cultures. One of the most widely known culturally supported ideas of informal dispute resolution is found in China. There, going to court is traditionally seen as shameful and a failure irrespective of the strength of the legal claim.⁷⁰ Further, Roberts and Palmer argue for an 'occupational impulse' driven by the demands and culture of work and organisations. Certain trades or professions feel that they are best placed to regulate themselves including any disputes that may emerge. This may be because of a wish for self-governance and independence or because of the sense that only people with particular knowledge, skills or experiences can rightly decide in such matters. They use the example of the mediaeval guild in both Europe and Imperial China.⁷¹ A further 'impulse' is located in the identity of the local community.⁷²

5.3 Voluntariness and autonomy

The voluntary nature of mediation is well-known and well-established. For example, Spencer and Brogan describe a five-fold philosophy of mediation⁷³ with voluntariness finding a place alongside confidentiality, empowerment, neutrality, and a 'unique solution.' Voluntariness can be described as the parties both entering the mediation voluntarily and reaching an agreement (or not) without any coercion. It can also be seen to be solely that any agreement is voluntary. Thus, there is a distinction conceptually between a compulsion to enter the mediation process and a compulsion to settle whilst in the mediation, 'and since compulsion to mediate is pressure of the former kind, there should be no objection.'⁷⁴ Voluntariness is the least controversial of the fundamental assumptions outlined here. It has not been seriously questioned as a hallmark of mediation by any author. There are questions however concerning how one can assess the genuine voluntariness with which a party enters a mediation and what safeguards can be in place. There are obvious guidelines in place that seek to prevent those with mental health issues from engaging in mediation. Further, mediators are typically trained to protect serious power imbalances between the parties. With legal representation increasingly common on both sides of a mediated dispute this aspect is lessening in significance. More widely though there remains what has been termed 'informed consent'.⁷⁵ This means that the individual party must truly understand what is required of them, what can be expected from the mediation, the mediator and the other party. As with any written advice from a lawyer to a client there is no guarantee that the party to a mediation will really understand what has been told them. Further, many clients may not approach a mediation in good faith. Thus, true voluntariness requires not just a lack of coercion but also an adequate understanding of the process and a willingness to engage in the process in good faith. There are subjective elements to assessing each of these in a given party. That they cannot always be accurately assessed or prepared for does not remove their fundamental status in mediation theory.

⁶⁸ Doo Leigh-Wai 'Dispute Settlement in Chinese-American Communities', [1973] 21 *American Journal of Comparative Law*, 627.

⁶⁹ Julian Sidoli del Ceno, 'Informal Law in an Urban Setting' in Nestor Davidson & Nisha Mistry (eds) *Law between buildings: Emergent global perspectives on urban law* (Ashgate, 2016).

⁷⁰ Bee Chen Goh, *Law Without Lawyers, Justice Without Courts: On Traditional Chinese Mediation* (Ashgate 2002). Siew Fang Law, 'Culturally Sensitive Mediation: The Importance of Culture in Mediation Accreditation' [2009] 20 *Australasian Journal of Dispute Resolution*, 162.

⁷¹ Roberts and Palmer n67 above at 27-29.

⁷² *ibid* at 31-38.

⁷³ David Spencer and Michael Brogan *Mediation Law and Practice*, (Cambridge, CUP, 2006) at 84-100 based on Ruth Charlton, *Dispute Resolution Guidebook*, (Pymont: LBC Information Services, 2000).

⁷⁴ Laurence Boulle & Miryana Nesci, *Mediation: Principles Process Practice* (Bloomsbury Pub. 2001) at 372.

⁷⁵ Jacqueline M. Nolan-Haley, 'Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-making,' [1999] 74 *Notre Dame Law Review*, 775.

Implicit in this view though is that the parties have sufficient autonomy. Autonomy from their lawyers, families, and friends to make the decision that they want. Autonomy too from the state and the civil justice system in that they have the autonomy to decide what is a suitable agreement for them. This requires that the individual has some space to operate in. Space that the state must allow them. This space is the private. There are areas of life that are regulated by the state – for example, boundaries. Boundaries can be usually accurately determined by a combination of the land registry, title deeds, chartered surveyors, and visual aids. It is possible then to settle a boundary dispute by using the civil justice system and reaching an answer that is determined by an approximation of law and fact. However, most boundary disputes are between two individuals over privately owned land. Usually there are no wider issues of public interest. Therefore, if the two parties settle this matter between themselves through mediation or otherwise then this is private. The parties have acted autonomously without a formal reference to the state. That the agreement reached is not what the courts might have ordered is of no concern if the parties have reached the agreement themselves.⁷⁶ This is of course an everyday situation. There is no compulsion on a party to issue a claim for breach of contract, trespass, occupier's liability, and a whole host of other civil wrongs.

5.4 Mediation as an Alternative Account of Justice

Spencer and Brogan's 'five-fold philosophy of mediation'⁷⁷ mentioned above aims to develop some of the core values of mediation by distinguishing it, by its very nature, from adjudication. Whilst this 'five-fold' model mentioned has some value in examining some of the 'values' that underpin the typical practice of mediation they do not properly address, nor seek to address, the more basic assumptions upon which mediation rest nor the deeper psychological, ethical and jurisprudential aspects. The same is true of very many other models that invariably focus on the practice of mediation. The purpose of this work as has already been alluded to is to go beyond this superficial account and try to ascertain what is foundational for a jurisprudence of mediation. One aspect of this is that mediation appeals to a different account of justice – the bottom-up rather than the top-down.

Traditional accounts of adjudication and other forms of social order have historically been wedded to a top-down or vertical conception with power emerging from a divinity or those that claim access to the will of the divinity, a mythical foundational law-giver or a sovereign. Even these top-down 'laws' are in most cases enforced by command. Some like Aquinian natural law make claims for universality whereas Austinian positivism is clearly man-made but both are fundamentally top-down. Whether through traditional natural law accounts or positivism most models display a 'legacy of command'.⁷⁸ Roberts and Palmer find this not only in familiar targets such as Hobbes and Austin but argue correctly that Locke, for example, still appeals to central authority and Weber talks of the *leiter* (the leader) and the *verband* (the following).

These parochial understandings of the 'modern' West...potentially distort any broader panorama. First, the central conception of 'order' as intimately linked to 'government' – in the sense of a self-consciously exercised steering role working within a separate, dominant 'public' sphere – fixes too strong an imprint on the way we see the social world.⁷⁹

The top-down approach to law and justice is now no longer universally, indeed widely accepted. Adjudication however remains a resolutely top-down process. Indeed, it would seem it must be so. The judge, the arbitrator and the adjudicator all operate as adjudicators,

⁷⁶ Assuming all other necessary conditions are met.

⁷⁷ Spencer and Brogan n72 above.

⁷⁸ Roberts and Palmer n67 above

⁷⁹ *ibid* at 83.

third parties that make decisions based on fact and law. Mediation does not operate in this way. The third party does not enforce a decision nor is the law or the facts of the dispute fundamental.⁸⁰ The parties are free to agree or disagree with each other and cannot be compelled to settle. This is then a key, perhaps the key distinction between adjudication and mediation. The former is top-down, the latter is bottom-up and yet it is with adjudication that mediation is in a particular relationship. Mediation is almost always compared to and develops in respect of its relationship to adjudication. Whilst there are some who worry about this, the majority do not. What is lost, perhaps, in 'purity' is gained by safeguards and esteem.

Alberstein argues, correctly it would seem that most models of mediation in some sense reject, or at least have some concerns about, what is usually termed 'legal formalism', that there is a coherent, systematic, external system of law that can provide 'fair' adjudicated answers to any 'legal' dispute. Legal formalism emerging as a distinct account displays an optimistic, some would argue naïve understanding of the law. What all versions share however is that law is 'out there' and does not emerge in a subjective or relative or personalised way through the course of the dispute. This traditional view of justice as adjudicated by the courts essentially being top-down and externally enforced has been questioned through legal anthropology. In essence, a wide variety of case studies of different ethnic, cultural and linguistic groups has demonstrated that Western (and other) norms and assumptions are not universal. We are no longer prepared to dismiss otherness as inferiority or backwardness. Further, it has opened-up systems of order that are in some cases naturally more conciliatory, more bottom-up and community driven. Examples abound. An early study still clearly bearing the imprint of Western assumptions of superiority, *Crime and Custom in Savage Society*,⁸¹ identified a lack of central authority institutionalised or otherwise. Famously, the Yanomani combine very little hierarchy or central control with what might be termed by Westerners a strong communitarian and egalitarian spirit. Similar aspects have been found in numerous other studies.

Clastres⁸² goes further and weaves a number of different anthropological and ethnographic studies into an account of a genuine, distinct, horizontal form of societal arrangement. Some within the wider ADR movement have lauded these studies and have suggested that there is no need *per se* for society to be wedded in all cases to institutionalised law and order issuing from a central authority. The anthropological account though is not without critics from within. An interesting case is Laura Nader who went from a position that saw at the very least value and lessons (for the USA in her case) with alternative dispute resolution to one that viewed the ADR movement as 'a pacification scheme, an attempt on the part of powerful interests in law and in economics to stem litigation by the masses, disguised by the rhetoric of an imaginary litigation explosion.'⁸³

The criticisms of Fiss, Genn and others all identify however loosely a concern with the bottom-up element of mediation. The traditional view of adjudication as a top-down enterprise underpins the judicial scepticism about mediation in some quarters - and compulsory mediation in others (although there are others who are both strongly in favour and who see no *prima facie* objection to compulsory mediation).⁸⁴ Critics of ADR such as Auerbach and Abel however accept that traditional litigation does not necessarily result in 'justice' as traditionally conceived. There remains a whole range of obstacles to civil justice. These range from an inequality of bargaining power to the ability of a truthful witness to appear credible in the witness box. There are others. In some jurisdictions there is the 'plea bargain' that at one

⁸⁰ Evaluative mediation makes more use of both law and facts but for this reason is not properly classified as mediation.

⁸¹ Bronislaw Malinski, *Crime and Custom in Savage Society*, (Kegan Paul, Trench and Trubner, 1926).

⁸² Pierre Clastres, *Society against the State: essays in political anthropology*, (trans R Hurley) (Oxford, Blackwell, 1977).

⁸³ Laura Nader, *The Life of the Law; Anthropological Projects* (Berkeley, University of California Press, 2002).

⁸⁴ Clarke MR, (2008) 'The Future of Civil Mediation' Speech to 2nd Annual Mediation Council Conference. http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr_mediation_conference_may08.pdf

level is a rational decision on the part of the individual based on pragmatic concerns quite separate from any reference to justice. Therefore, it is a false opposition to portray litigation as resulting in justice and mediation as merely a compromise agreement that may or may not bear any relation to justice.

It is, then, argued that it is important to properly grasp the concept of justice (if indeed 'justice' is the correct term, loaded as it is with so much meaning) that is applicable not just to the aims of mediation but to its process too. For example, Rock describes an alternative view of justice favoured by many involved, 'In mediation, justice can be understood as the justice that the parties themselves experience, articulate, and embody in their resolution of dispute'.⁸⁵ This wider and, arguably, 'softer' view of justice pervades much thinking on alternative dispute resolution. Hyman and Love describe the bottom-up approach to justice as drawing on:

[t]he rules, standards, principles and beliefs that guide the resolution of the dispute . . . are those held by the parties. The guiding norms . . . may be legal, moral, religious or practical. Parties are free to use whatever standards they wish, not limited to standards that have been adopted by the legislature or articulated by the courts.⁸⁶

Critics of Hyman and Love characterise this view as 'whatever' is agreed upon is justice.⁸⁷ This is not a fair account. Rather, a correct account would go – assuming sufficient intelligence, autonomy and reasonable advice in a dispute concerning genuinely private law then the outcome that the parties arrive at is 'just' for them. Many of these qualifications need to be separately understood and what is 'genuinely private' again needs discussion. It is a subjective position but not radically so. Nor is it one without safeguards. Mediators are trained to spot clients who fail to understand the process or who lack autonomy. As discussed earlier, mediation is now frequently indeed usually part of a wider civil (or family) justice. Lawyers are now very much part of the process. This view of justice as being 'from below' then represents a view that law and dispute resolution can be educative and progressive, that it can encourage and empower individuals to resolve their own problems which ultimately results in a more mature society less determined to argue and litigate. It argues that there can be different solutions and indeed different right answers for different people even when faced with similar conflicts. It does not claim that all disputes can or should be mediated. It does not claim that mediation will resolve all disputes even where it is an appropriate method. It does not seek to displace adjudication within the law but rather act in a complementary way with it.

5.5 Mediation as Plurality

The final foundational principle of mediation theory is plurality. We are not referring here to legal pluralism. Legal pluralism has many definitions. There seem to be at least two main accounts, the descriptive and the normative. The descriptive can be seen in Engle Merry's definition as where 'two or more legal systems coexist in the same social field'.⁸⁸ This view is shared by others⁸⁹ and criticised for its vagueness and lack of usefulness by Tamanaha: '[t]he

⁸⁵ Evan Rock, 'Mindfulness Mediation, The Cultivation of Awareness, Mediator Neutrality and the Possibility of Justice' [2006] 6 *Cardozo Journal of Conflict Resolution*, 347.

⁸⁶ Jonathan Hyman & Lela Love, 'If Portia Were a Mediator: An Inquiry into Justice in Mediation', [2002] 9 *Clinical Law Review*, 157, 160.

⁸⁷ See Joseph Stulberg, 'Mediation and Justice: What standards govern?' [2005] 2 *Cardozo Journal of Conflict Resolution*, 213.

⁸⁸ Sally Engle Merry, 'Legal Pluralism' [1988] *Law and Society Review*, 869, 870.

⁸⁹ For example, Jeremy Waldron, 'Legal Pluralism and the Contrast between Hart's Jurisprudence and Fuller's' in Peter Crane (ed) *The Hart-Fuller Debate in the Twenty-First Century*, (Oxford, Hart, 2010).

legal pluralist attachment of the word 'law' to lived systems of normative order adds no more information, and generates resistance and confusion.⁹⁰

This view then is contrasted with legal monism, that law properly understood consists of one system however imperfect. Normative legal pluralism argues that there is and ought to be a number of different legal orders. However, what is being argued for here is not legal pluralism but rather a pluralism in social ordering. It is in effect appealing to the Fullerian project that was outlined above. It is a small claim but one that is intended both descriptively and normatively. It is a claim that there are numerous ways that individuals in any given society order themselves including resolving disputes. It is also a claim that this is good. This Fullerian pluralism avoids the difficulties and debates of 'legal pluralism.' It also allows mediation to exist in relationship to the formal civil justice system without precluding that in some cases it may operate wholly independently of the courts. Community mediation is an example of this. Frequently, a legal dispute has not crystallised and in many cases it may do so. For example, people parking lawfully in streets during the school run is not a matter that can be litigated. It can however cause anger and frustration. That a community mediation scheme can operate in such a situation is surely beneficial. It provides an arena for the dispute to be resolved, allows views to be aired and potentially stops the matter escalating.

If one accepts bottom-up justice, then one accepts a form of plurality. The claim here is not then a radical version of plurality. It does not need to make a claim that there is no higher standard or no law. It is not an ontological claim. Rather, it is the plurality of description. It emerges from anthropology recognising that just as different tribes, peoples and cultures have different ways of settling disputes. It emerges from observing civil litigation in practice in England and Wales, the different personalities of the clients and their lawyers, their differing needs, the mood and approach of the judge. It can be seen in the vast number of disputes that are settled or simply forgotten about that could have been litigated.

6. Conclusion: Mediation, Pluralism and Justice

This chapter has provided a critical presentation of the current literature on the jurisprudence of mediation. It has argued that there are a number of different approaches and that these reveal much about the first order assumptions of those who hold them. Rather than there being one correct approach to grounding mediation, there are many. This is not a negative but rather should be seen as a positive emerging as it does out of the flexibility and creativity inherent in the process.

With all of them perhaps the core assumption is that justice is not always top-down or applied by an external authority. Depending on what theory one holds as predominant – and as outlined these are not always mutually exclusive – then justice appears in different guises. For the pragmatist, justice could be economic – the cheapest resolution, there are no 'bigger' ideas present. For the transformative theorist, it is the justice of self-discovery and change, for the narrative conception it is genuinely a discovery of self-made justice.

Mediation then depends on a bottom-up conception. Bottom-up or horizontal justice necessarily involves accepting a wide variety of participants bringing many different norms, practices, aspirations, and the like with them. This results in a plurality, a plurality within mediation but also places mediation within a plurality of social ordering. Voluntariness and autonomy, bottom-up justice, and plurality – are then central to a true understanding of mediation.

⁹⁰ Brian Tamanaha, 'The Folly of the 'Social Scientific' Concept of Legal Pluralism' [1993] 20 *Journal of Law and Society*, 192, 212.

The United Kingdom is almost certainly a more plural place now than in 1969. There have been vast social, political, and cultural changes and there is, in most areas of debate, a wider range of opinion in terms of ethics, politics, aesthetics and the like. There has also been a widely noted breakdown in respect for traditional forms of authority. Mediation then with its appeal to the personal and the plural, with its recognition of diversity, with its keenness to empower and with its implied, gentle scepticism of external 'top-down' authority seems very much to capture the zeitgeist of the age. Mediation has emerged almost out of the ether during the last 50 years. It seems likely to play an ever-bigger role in the next 50.